Filed 2/4/05 P. v. Gonzales CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. RICKY GONZALES, Defendant and Appellant.	C046229 (Super. Ct. No. MF027267A)

Defendant Ricky Gonzales was convicted of five crimes, with special sentence enhancements, based upon an incident involving fellow gang members. On appeal, he contends (1) the trial court erred in failing to instruct on attempted voluntary manslaughter as a lesser included offense to the charge of attempted murder, (2) the evidence does not support the jury's finding that he was a convicted felon in possession of a firearm, (3) service of the sentences for two of his convictions must be stayed, and (4) an upper term of imprisonment was imposed in violation of *Blakely v. Washington* (2004) 542 U.S. __ [159 L.Ed.2d 403].

We shall modify the judgment to stay the sentences imposed on counts four and five, and affirm the judgment as modified.

FACTS

The convictions in this case arose out of an incident that occurred in Manteca on June 1, 2003. The primary persons involved were defendant, Chris Cabrera, and Mark Herrera on one side, and Frank Nevarez, on the other.

The predominant Hispanic criminal street gang in Manteca is the Nortenos. Cabrera and Nevarez are identified as members of the Nortenos. Herrera is identified as a Norteno associate. Defendant is regarded as a Norteno "shotcaller," i.e., a person in a kind of supervisory role who can call for assaults on other persons, organize specific crimes, and levy out discipline against other gang members. The entire foundation of a criminal street gang is built around a warped notion of respect. If a member fails to seek retribution for a real or perceived insult, or otherwise fails to act when gang standards dictate that he should, then he loses his standing within the gang, as well as with rival gangs.

The Nortenos have something of a constitution, known as the "14 Bonds," that outlines rules and regulations for the conduct of members. Rule four provides that no Norteno should disrespect another Norteno's girlfriend, wife, or family. Violation of the rule can result in severe repercussions. Discipline can take a variety of forms, all the way up to being killed.

At the time of this incident, defendant believed that Nevarez had shown disrespect to his girlfriend by grabbing or slapping her on the buttocks. Defendant got Cabrera and Herrera together and

said that they were going to find Nevarez to "throw down with him, to fight him," because of his disrespectful conduct.

Defendant, Cabrera, and Herrera took a taxi cab to a Norteno party house where they expected to find Nevarez. Herrera testified that the cab driver was a "tweaker lady" who would give the group cab rides in exchange for methamphetamine. After dropping off the group at the party house, the driver either waited for them or left and returned a short while later.

Upon entering the house, defendant and Cabrera immediately began fighting with Nevarez. The fight ended up outside, and Nevarez broke free and ran. Defendant, Cabrera, and Herrera then returned to the cab. As the cab began to drive away, they again encountered Nevarez. Witnesses heard an argument, and Nevarez apparently took an ineffectual swing at defendant. Cabrera gave defendant a gun and, as Nevarez fled, defendant fired several shots at him.

Defendant was found guilty of attempted murder (count one; Pen. Code, §§ 187, 664 [further section references are to the Penal Code unless otherwise specified]), willful and malicious discharge of a firearm from a motor vehicle at another person (count two; § 12034, subd. (c)), assault with a semiautomatic firearm (count three; § 245, subd. (b)), carrying a loaded firearm while an active participant in a criminal street gang (count four; § 12031, subd. (a)(2)(C)), and possession of a firearm by a convicted felon (count five; § 12021, subd. (a)(1)).

The jury further found that defendant acted for the benefit of, at the direction of, or in association with, a criminal street

gang with the specific intent to promote, further, or assist in criminal conduct by the gang with respect to counts one, two, and three (§ 186.22, subd. (b)(1)), that he personally and intentionally discharged a firearm with respect to count one (§ 12022.53, subd. (c)), and that he personally used a firearm with respect to counts two and three (§ 12022.5, subd. (a)). By stipulation of the parties, an allegation that defendant committed the offenses while free on bail from other charges (§ 12022.1) was tried to the court, which found it to be true.

Sentencing was combined with the sentencing for defendant's convictions that arose out of another incident that occurred about two weeks prior to the crimes in this case.[1] For the convictions in this case, defendant was sentenced to the upper term of nine years on count one, with enhancements of 20 years for discharging a firearm, and 10 years for participating in a criminal street gang, while committing count one, plus consecutive terms of eight months each on counts four and five, and an enhancement of two years for committing the offenses while on bail. Service of sentences on counts two and three was stayed pursuant to section 654.

Together with sentencing on his convictions in the other case, defendant received a state prison term of 15 years to life plus a determinate term of 53 years 8 months.

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[1] Defendant's other convictions occurred in *People v. Gonzales*, San Joaquin County Superior Court No. MF027235A, a companion case on appeal. (*People v. Gonzales* (Feb. 4, 2005, C046237) [nonpub. opn.].)

DISCUSSION

I

Defendant contends the trial court erred in failing to instruct sua sponte on attempted voluntary manslaughter through heat of passion as a lesser included offense of attempted murder as charged in count one. He argues that after his girlfriend was insulted by Nevarez, defendant "achieved 'payback'" by his fist fight with Nevarez. Then, as defendant was leaving, Nevarez continued the argument and tried to punch defendant, thus provoking the gunshots. We are not persuaded.

The distinction between murder and voluntary manslaughter, and thus between attempted murder and attempted voluntary manslaughter, lies in the existence of malice. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) A person who unlawfully attempts to kill nonetheless lacks malice--and is guilty of attempted voluntary manslaughter--if his "reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 163; see also *People v. Lasko, supra*, 23 Cal.4th at p. 108.)

Defendant's claim of heat of passion lacks merit for a number of reasons.

First, the passion for revenge can never qualify to negate malice and reduce an attempted murder to attempted manslaughter. (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.) Although there is no evidence that Nevarez actually showed disrespect for

defendant's girlfriend, and thus disrespect to defendant, there is ample evidence to show defendant believed that Nevarez had done so. But defendant's desire to exact retribution, or to impose discipline for the violation of gang rules, cannot support a heat of passion argument.

Second, a person who engages in criminal behavior cannot claim that his victim's response constitutes provocation. (*People v. Jackson* (1980) 28 Cal.3d 264, 306, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) Here, defendant instigated an assault on Nevarez, took along cohorts to ensure that Nevarez would be outnumbered, and succeeded in inflicting bodily injuries upon him. Nevarez's response to the attack cannot be considered provocation.

Third, a person may not instigate a fight and, without first trying in good faith to withdraw from the conflict, attempt to kill his adversary and then rely upon heat of passion. (*People v. Walker* (1946) 76 Cal.App.2d 10, 14; *People v. Montezuma* (1931) 117 Cal.App. 125, 130.) Defendant instigated an assault upon Nevarez. When Nevarez ran away, defendant and his cohorts returned to their ride. Had they intended to withdraw from further fighting, they could have driven away. Instead, they stayed to continue the argument and in short order to fire gunshots at Nevarez as he fled.

Fourth, as the California Supreme Court said long ago, "in case of mutual combat, in order to reduce the offence from murder to manslaughter, it must appear that the contest was waged upon equal terms, and no undue advantage was sought or taken by either side . . . . " (*People v. Sanchez* (1864) 24 Cal. 17, 27.) Here,

defendant instigated the fight with Nevarez and, in doing so, took steps to ensure that Nevarez would be outnumbered and, eventually, disadvantaged by the presence of a gun.

Fifth, without more, mere words or gestures cannot constitute adequate provocation for a shooting. (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739-740.) Here, there was evidence of defendant's words to Nevarez at the time of the shooting, such as that he got what was coming to him for slapping defendant's girlfriend's skin, but the evidence did not establish anything that Nevarez may have said to defendant. Moreover, simple assault that does not cause substantial pain or injury cannot constitute adequate provocation for a shooting. (*People v. Fenenbock, supra*, 46 Cal.App.4th at p. 1705.) Hence, an ineffectual punch thrown by Nevarez after being subjected to a beating is not adequate provocation. Where the claimed provocation is so slight that reasonable jurors could not find it to be adequate to provoke the passions of an ordinarily reasonable person, then the claim may be rejected as a matter of law. (*Ibid.*, see also *People v. Pride* (1992) 3 Cal.4th 195, 250.) This is such a case.

Finally, a trial court does not have an obligation to instruct sua sponte on heat of passion unless both adequate provocation and heat of passion are affirmatively demonstrated. (*People v. Sedeno* (1974) 10 Cal.3d 703, 719, disapproved on other grounds in *People v. Breverman, supra,* 19 Cal.4th at p. 178, fn. 26 and *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; see also *People v. Jackson, supra*, 28 Cal.3d at p. 305.) "It is not enough that provocation alone be demonstrated. There must also be evidence

from which it can be inferred that the defendant's reason was in fact obscured by passion at the time of the act." (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 719.) Here, even if we ignore the dirth of evidence of adequate provocation, there was no evidence to demonstrate that defendant in fact acted in a heat of passion. His conduct was entirely consistent with his original purpose, to impose retribution upon Nevarez for the perceived lack of respect for defendant's girlfriend.

In any event, as we will explain, defendant cannot complain because his defense counsel told the trial court that he was making a tactical decision not to have any instructions on lesser included offenses. The defense strategy was to challenge the claim that defendant was the perpetrator and, in this light, counsel believed that instructions on lesser included offenses "would confuse the jury terribly."

Defendant notes that a trial court has a duty to instruct on lesser included offenses which are supported by evidence, even when the defense objects. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) It is true that "[t]he obligation to instruct on lesser included offenses exists even when a defendant, as a matter of trial tactics, objects to their being given. But the doctrine of invited error will operate to preclude a defendant from gaining reversal on appeal because of such an error made by the trial court at the defendant's behest." (*People v. Duncan* (1991) 53 Cal.3d 955, 969.)

Here, the victim, Nevarez, and one of defendant's cohorts, Cabrera, did not testify. The other witnesses were reluctant to

identify defendant as the perpetrator and were evasive in their testimony. Although the evidence was sufficient to support the jury finding that defendant was the perpetrator, it left room for defense counsel to argue reasonable doubt on that question. Since heat of passion can be inconsistent with a denial of presence at the scene (see *People v. Johnson* (1993) 6 Cal.4th 1, 43), and in view of the lack of any real evidence to support a heat of passion argument, counsel's tactical choice was reasonable. Accordingly, the trial court's failure to give heat of passion instructions cannot support reversal of the judgment because it was invited by defense counsel. (*People v. Duncan, supra,* 53 Cal.3d at p. 969.)

II

Defendant claims the evidence does not support his conviction on count five, possession of a firearm by a convicted felon. We disagree.

There was undisputed testimony that defendant had a prior felony conviction for automobile theft. And the People submitted documentary evidence reflecting the prior conviction. However, defendant now contends that the documentary evidence reflects a conviction for a misdemeanor rather than for a felony. Not so.[2]

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[2] The People ask us to take judicial notice of the reporter's transcripts of the proceedings that resulted in defendant's prior conviction. According to the People, such a procedure was authorized in *People v. Wiley* (1995) 9 Cal.4th 580, at page 594 (hereafter *Wiley*). We disagree. *Wiley* involved an issue with respect to an enhancement allegation upon which the appellant had no right to a jury determination. (*Ibid.*) Although the evidence before the trial court supported its finding, that was a matter which could be revisited on habeas corpus with evidence

Defendant's prior conviction was for theft or unauthorized use of a vehicle in violation of Vehicle Code section 10851, subdivision (a). This section provides for punishment by imprisonment in the county jail for not more than one year, or by imprisonment in the state prison, or by fine, or by both imprisonment and fine. Since the offense can be punished by a jail term or a prison term, it is a so-called "wobbler," that is, a crime that can be a felony or a misdemeanor in the discretion of the court. (§ 17, subd. (b); *People v. Municipal Court (Kong)* (1981) 122 Cal.App.3d 176, 179, fn. 3.)

Section 17, subdivision (b) sets forth the circumstances in which an offense that is a wobbler becomes a misdemeanor: (1) upon a judgment imposing punishment other than imprisonment in state prison; (2) when, upon committing the defendant to the Youth Authority, the court declares the offense to be a misdemeanor; (3) when the court suspends the imposition of sentence and grants probation and at that time, or upon subsequent application, declares the offense to be a misdemeanor; (4) when the prosecutor files a complaint specifying the crime to be a misdemeanor in a court having jurisdiction over misdemeanors; and (5) when, at or before a preliminary hearing or

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outside the trial record. (*Ibid.*) Under those circumstances, the Supreme Court concluded that it was appropriate to take judicial notice of additional materials in order to resolve the question. (*Ibid.*) Here, in contrast, we are considering a conviction by a jury for a substantive offense. Obviously, in determining whether the evidence supports the jury verdict, we must confine our consideration to evidence that was before the jury. (*People v. Pearson* (1969) 70 Cal.2d 218, 221-222, fn. 1.) Accordingly, we deny the request for judicial notice.

before filing a holding order pursuant to section 872, the magistrate declares the offense to be a misdemeanor.

Until one of these measures is taken to designate a crime as a misdemeanor, the crime is treated as a felony for all purposes. (*People v. Williams* (1945) 27 Cal.2d 220, 229.) This includes the prohibition against the possession of a firearm by a convicted felon. (*People v. Banks* (1959) 53 Cal.2d 370, 387-388.)

The People's exhibit 25 reflects that in 2001, defendant was charged in Santa Clara County Superior Court with two counts of theft or unauthorized use of a vehicle. (Veh. Code, § 10851, subd. (a).) It was alleged that he took, damaged, or destroyed property of a value exceeding $50,000. (§ 12022.6, subd. (a)(1) [this section specifies a one-year enhancement for any felony in which property of a value greater than $50,000 is taken, damaged, or destroyed].) He also was charged with misdemeanor driving with a suspended or revoked license. (Veh. Code, § 14601.1, subd. (a).)

Defendant entered into a plea agreement. The minute order shows he agreed to plead nolo contendere to count two, the theft or unlawful use of a vehicle as a felony, nolo contendere to the enhancement allegation on count two, and nolo contendere to the misdemeanor charge. Count one would be dismissed, and defendant would be granted formal probation for three years, with a six-month jail term. Defendant was advised of various matters, including that his conviction would preclude him from possessing firearms. The minute order form has places where it may be indicated that a condition of the plea would be reduction of the crime to a misdemeanor immediately or reduction of the crime to a misdemeanor

after one year of probation. Reduction to a misdemeanor was not made a part of defendant's bargain.

Defendant was sentenced in accordance with his agreement. The court suspended imposition of sentence and granted formal probation for three years. And the court ordered defendant to serve six months in the county jail as a condition of probation. The court did not declare the offense to be a misdemeanor.

Nevertheless, defendant points to the six-month jail term ordered by the court and asserts that was a punishment other than imprisonment in the state prison, thus making the offense a misdemeanor. The contention fails.

A court cannot impose and order execution of sentence and grant probation. The concepts are mutually exclusive. (See *People v. Municipal Court (Lozano)* (1956) 145 Cal.App.2d 767, 771; *People v. Berkowitz* (1977) 68 Cal.App.3d Supp. 9, 13, disapproved on another ground in *People v. Superior Court (Douglass)* (1979) 24 Cal.3d 428, 435.) Therefore, in granting probation, a court must either impose sentence but suspend execution, or suspend the imposition of sentence. (§ 1203.1, subd. (a).)

In defendant's prior proceeding, the court suspended the imposition of sentence and granted probation. When the court suspends the imposition of sentence and grants probation, the order granting probation is deemed to be a final judgment for purposes of taking an appeal but is not a judgment imposing punishment within the meaning of section 17, subdivision (b)(1). (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796;

People v. Banks, supra, 53 Cal.2d at pp. 375-376, 384-385.) In such a circumstance, the offense is a felony unless the sentencing court expressly declares it to be a misdemeanor. (§ 17, subd. (b)(3).)

In granting felony probation, a court may order the defendant to serve a period of time in county jail. (§ 1203.1, subd. (a).) Such an order is a condition of probation rather than a judgment imposing punishment. (*People v. Rojas* (1962) 57 Cal.2d 676, 680.) Where, as here, a court suspends the imposition of sentence, grants probation with an order for a term in county jail, and does not declare the offense to be a misdemeanor pursuant to section 17, subdivision (b)(3), then the offense is a felony for purposes of the prohibition against possession of firearms by convicted felons contained in section 12021. (See *People v. Banks, supra*, 53 Cal.2d at pp. 375-376.)

III

Defendant contends that service of sentence on count four, carrying a loaded firearm while an active participant in a criminal street gang, and count five, possession of a firearm by a convicted felon, must be stayed pursuant to section 654. We agree.

Section 654 provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." In *Neal v. State of California* (1960) 55 Cal.2d 11, at page 19, the Supreme Court held that section 654 precludes multiple punishment not only

where there is a single act in the ordinary sense, but also when a course of conduct that violates multiple statutes constitutes an indivisible transaction. "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*) Although there are limitations and exceptions to this formulation, it remains the basic test for the application of section 654. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216.)

When a person unlawfully possesses a firearm and uses it to commit another offense, then section 654 may be applicable. "Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. [Citation.] Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. [Citations.] On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense." (*People v. Venegas* (1970) 10 Cal.App.3d 814, 821; see also *People v. Bradford* (1976) 17 Cal.3d 8, 22.)

Unlawful possession of a firearm tends to be a continuing offense. In most instances where a firearm is used to commit a crime, there will be sufficient evidence to demonstrate possession of the firearm that is divisible from the other offense. (See *People v. Jones* (2002) 103 Cal.App.4th 1139, 1144-1147; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412-1413.) But this case is one of the rare instances where that is not so.

The taxi driver testified that one of defendant's cohorts had the gun immediately before the shooting. He either gave the gun to defendant or defendant took it from him and fired shots at Nevarez. According to Herrera, Cabrera had the gun and then passed it to defendant. When he was arrested a few hours after the shooting, Cabrera was again in possession of the gun. This evidence reflects only a transitory possession of the firearm indivisible from the offense of attempted murder.

The People argue section 654 does not preclude the imposition of multiple sentence enhancements arising out of use or discharge of a firearm. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313.) But we are not here considering the imposition of sentence enhancements; rather, we are concerned with punishment for multiple substantive offenses that arose out of one criminal transaction.

Also without merit is the People's claim the evidence supports a finding that the gun was in defendant's constructive possession while it was in the physical possession of Cabrera.

Unlawful possession of a firearm does not require actual physical possession; rather, possession may be joint or constructive. (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 130; *People v. Nieto*

(1966) 247 Cal.App.2d 364, 368.) However, it must be shown that the defendant knew of the presence of the gun and intended to have control over it. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922; *People v. Hunt* (1963) 221 Cal.App.2d 224, 227.) In decisions that uphold convictions for unlawful possession of a firearm based upon joint or constructive possession, there is at least some evidence, such as conduct or statements, from which the defendant's knowledge and intent can be inferred. (See *People v. Taylor* (1984) 151 Cal.App.3d 432, 436; *People v. Harrison* (1969) 1 Cal.App.3d 115, 119; *People v. Nieto, supra*, 247 Cal.App.2d at p. 368.)

Here, we know only that Cabrera handed a gun to defendant, that defendant used it to commit attempted murder, and that he then gave the gun back to Cabrera. The People suggest that defendant knew Cabrera had the gun and perhaps even told him to bring it to the encounter with Nevarez. However, on the record presented, that is mere suspicion. And suspicion is not sufficient to support a finding of fact. (*People v. Martin* (1973) 9 Cal.3d 687, 695; *People v. Kunkin* (1973) 9 Cal.3d 245, 250.)

While the evidence is ample to support defendant's convictions on counts four and five, we conclude that it does not establish those offenses were divisible from the attempted murder for which defendant was convicted and sentenced in count one. Accordingly, the service of sentences on counts four and five must be stayed pursuant to section 654 (*People v. Bradford, supra*, 17 Cal.3d at pp. 22-23), which will have the effect of reducing the determinate term by one year four months.

IV

Lastly, in a supplemental brief, defendant contends that imposition of the upper term for attempted murder violated his right to a jury trial as interpreted by the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) and *Blakely v. Washington, supra,* 542 U.S. ___ [159 L.Ed.2d 403] (hereafter *Blakely*).

Apprendi held that, other than the fact of a prior conviction, a fact which increases the possible penalty for a crime beyond the statutory maximum must be tried to a jury and be proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) *Blakely* held that for this purpose, the statutory maximum is the maximum sentence that a court could impose based solely upon facts reflected in the jury's verdict or admitted by the defendant. (*Blakely, supra,* 542 U.S. at p. __ [159 L.Ed.2d at pp. 413-414].) Accordingly, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact finding, there is a right to a jury trial and to proof beyond a reasonable doubt on a fact that will expose the defendant to the enhanced sentence. (*Ibid.*)

Here, the trial court relied in part upon defendant's numerous prior convictions as a basis for imposition of the upper term. The record shows that in the two years preceding the current offenses, defendant was almost continuously involved in criminal conduct and resulting judicial proceedings. During that time, there were six criminal proceedings brought against defendant that resulted in seven criminal convictions. Three of the convictions were for

misdemeanors (§ 417, subd. (a)(2) [making a threat with a firearm]; Veh. Code, § 14601.1, subd. (a) [driving with a suspended or revoked license]), three were for "wobblers" that were treated as misdemeanors (§§ 459 [second degree burglary]; 487, subd. (a) [grand theft]; 496, subd. (a) [receiving stolen property]), and one was for a felony (Veh. Code, § 10851 [theft or unlawful use of an automobile]).

Thus, since the *Apprendi/Blakely* rule does not apply when the fact of a prior conviction is the basis for imposing upper term, there was no sentencing error in this case.

DISPOSITION

The judgment is modified by staying service of the sentences imposed on count four, possession of a loaded firearm by a gang participant, and count five, possession of a firearm by a convicted felon. Consequently, defendant's total determinate prison term is 52 years 4 months. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification, and to send a certified copy of the amended abstract to the Department of Corrections.

SCOTLAND, P.J.

We concur:

BLEASE, J.

DAVIS, J.